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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 522

SENCO PRODUCTS, INC.,

Petitioner,

vs.

FASTENER CORPORATION AND DUO-FAST CO.,

Respondents.

PETITIONER'S REPLY BRIEF.

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Respondents in their brief appear to rely primarily on the position that the conflict between the Sixth and Seventh Circuit decisions is apparent rather than real. This argument is based on the reasoning that counsel in the Seventh Circuit argued the question of validity strenuously while counsel in the Sixth Circuit raised the question of validity with less vigor. Regardless of the accuracy of this premise, the fact of whether or not a conflict exists depends not on what was **argued** in the two circuits but, rather, on what was **decided** by the courts involved. The Sixth Circuit Court of Appeals found the Juilfs patent 2,671,214 to be valid. The Seventh Circuit found the patent to be invalid. To argue that the courts reached their decisions on the basis of different arguments cannot in any way erase the basic conflict that exists between the decisions in the two circuits.

To sustain their position that no conflict exists unless

the issues were presented in a similar manner. Respondents cite three cases (Respondents' Brief, pp. 9-10). These cases completely fail to support Respondents' position. Respondents cite *S. H. Kress & Company* v. *Elie P. Aghnides, et al.*, 355 U. S. 889, 78 S. Ct. 261 (1957), and *Westinghouse Electric Corporation* v. *Bulldog Electric Products Company*, Case No. 424, October Term 1953, Certiorari Denied 346 U. S. 909, 74 S. Ct. 240 (1953), as supporting their position but both of these cases are merely memorandum decisions where certiorari was denied and no reason for the denial is stated. The third case, *Layne & Bowler Corporation* v. *Western Well Works, Inc.; et al.*, 261 U. S. 387, 393, 43 S. Ct. 422, 423 (1923), is a patent case where the two circuits found the patent valid, found certain claims infringed, and interpreted the claims similarly. This Court found that no conflict existed, as it obviously did not.

What was **decided** in the Sixth Circuit is as follows:

In its appeal in the Sixth Circuit case, the defendant set forth as its item 19:

> "19. Does the state of the patented art, exemplified in defendant's exhibit 18, establish that the patents in suit are invalid and void for want of invention?
>
> The Trial Court answered 'No'.
> The answer should be 'Yes'."

This item 19 was paraphrased as question number 4 in Appellee's (Petitioner here) brief to the Court of Appeals for the Sixth Circuit (A. p. 629). The patents in the exhibit 18 referred to are listed in full (A. pp. 628-629). These **39** patents include both Von Vass 1,186,458 and Randall 1,939,632 which are so much relied upon by Respondents.

The District Court (in the Sixth Circuit) made the following finding of fact as to the patent here in suit (A. pp. 503-504):

"9. The claims of Patent No. 2,671,214 are directed to a novel, pneumatic tool for driving staples in production line work and in particular these claims are directed to what has become known as the 'free running driver' feature of construction; a tool incorporating this feature includes a piston having a recess, a driver free of the piston but having means to seat within the recess, a spring resisting movement of the driver, a separate stop for the piston, a main casting in which the parts are housed, and pneumatic means including a firing valve whereby the piston is moved against the driver and its spring so that the driver will contact a staple and move it into the work. If fired in the open, the driver is free to advance by its momentum, even after the piston has stopped, and this is what is termed the free running driver. The claims are also directed to the described basic elements in combination with novel nose structure for properly guiding the staple as driven. The claims of this patent define a structure which has proved to be a meritorious contribution to the art and of use and advantage to the public."

The Court of Appeals, Sixth Circuit, 242 Fed. (2d) 565, concluded its opinion with the following Finding and Judgment (App. B., p. 23):

"The findings of the district court are sustained by the evidence; and no error appearing in its conclusions of law, the judgment of the district court is affirmed."

The District Court (in the Sixth Circuit), which was affirmed in its Judgment, had also held (A. p. 508):

"Plaintiff has sustained the burden of proof of its Complaint and is entitled to judgment in accordance with the prayer thereto as follows:

1. It is decreed that Plaintiff's aforesaid letters patent No. 2,671,214 are good and valid and have been infringed by Defendants Travis M. Sasser (an individual also doing business as Cincinnati Shippers Supply * * *)."

There is a well known principle that courts speak by Judgments. The Judgment of the Court of Appeals of the Sixth Circuit was as follows:

> "THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.
>
> ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.
>
> Approved for entry:
>
> /s/ THOMAS F. MCALLISTER,
> *United States Circuit Judge.*"

Under the present state of affairs the general public is faced with a situation where the patent is valid in the Sixth Circuit and invalid in the Seventh, but the public has no idea of the status of the patent in other jurisdictions. The general public is a party in interest in this case and the writ should therefore issue.

Respectfully submitted,

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